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February 23, 1994

Mr. Andrew S. Fishel  
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FEDERAL COMMUNICATIONS  
COMMISSION  
OFFICE OF THE  
SECRETARY

FEB 24 '94

RECEIVED

Re: ET Docket No. 93-266, Review of the Pioneer's Preference Rules; Gen. Docket No. 90-314, Amendment of the Commission's Rules to Establish New Personal Communications Services

Dear Mr. Fishel:

On January 26, 1994, I submitted a letter on behalf of Pacific Bell informing you that Pacific Bell had reason to believe that certain parties had violated the Commission's ex parte rules. All three parties mentioned in my letter -- American Personal Communications ("APC"), Omnipoint Communications, Inc. ("Omnipoint"), and Cox Enterprises, Inc. ("Cox") -- have now responded. Unfortunately, a reply is required to clarify the record.

APC has made a number of accusations against Pacific Bell. These accusations have nothing to do with the issue in my letter, which is whether there were improper ex partes. But the accusations nonetheless must be answered.

APC begins its letter by asserting that Pacific Bell is bent on "imped[ing] competition and new PCS services through regulatory delay and abuse of legal process;"<sup>1</sup> Cox levels a similar accusation.<sup>2</sup> The record demonstrates that those accusations are untrue. Pacific Bell has been steadfast in its support of the

<sup>1</sup>Letter from Jonathan D. Blake & Kurt A. Wimmer to Andrew S. Fishel 1 (Feb. 4, 1994) ("APC Letter").

<sup>2</sup>Letter from Mark J. Tauber to Andrew S. Fishel 6 (February 4, 1994) ("Cox Letter").

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Commission's Pioneer's Preference Program; it has consistently supported the Commission's decision to open up spectrum for new personal communications services. APC concedes as much. APC Letter at 9 (noting that, in all its previous filings, "Pacific Bell supported the preference policy for broadband PCS"). And, contrary to APC's assertions, Pacific Bell does not retreat from that support today. It wishes only to ensure that all preference awards are based on innovative technology rather than lobbying.

APC also asserts that Pacific Bell is running a "media campaign" concerning the ex parte contacts described in my letter, which is designed to impugn APC's and the Commission's integrity. Apparently intended as evidence in support of that claim, APC complains that it "did not receive a 'service' copy of that letter until delivery of regular mail on Saturday, January 29," whereas Pacific Bell immediately contacted the press to publicize the letter. APC Letter at 1-2 n.2. APC never mentions that it asked for and received a courtesy copy, by hand delivery, two days earlier on January 27. For APC to complain about when the official "service" copy arrived -- not once but twice, ibid. & id. at 8 -- without ever mentioning the earlier arriving courtesy copy is disingenuous.

More fundamentally, nothing in my letter can be said to impugn the integrity of the Commission. To the contrary, as explained in my initial letter (at 5), Pacific Bell believes that the Commission has been particularly diligent about ex parte contacts in these matters, repeatedly warning the parties about the strict requirements of its rules.

Beyond this, Pacific Bell categorically denies conducting a media campaign concerning the ex parte issues raised in my letter. In fact, Pacific Bell specifically instructed its employees that they were to try to avoid discussing the letter if contacted by the press.<sup>3</sup> It is for this reason that APC cannot find a Pacific Bell quote in the press concerning ex parte contacts. The one remark that APC does quote, the assertion that Pacific Telesis may be "hobbled" by the preference awards, APC Letter at 8, was made by

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<sup>3</sup>APC does not even identify the source of its information concerning its fictitious media campaign. Instead, it relies on the passive voice, stating that its lawyers "have been made aware" of that campaign.

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the author of the article, not Pacific Bell.<sup>4</sup> Moreover, it has nothing to do with ex parte contacts. Instead, as the article makes abundantly clear, it concerns Pacific Bell's position that failing to require award recipients to pay for their awards puts non-awardees -- who must purchase their licenses at auction and charge their customers more to recover capital costs -- at a competitive disadvantage.<sup>5</sup>

Any doubts concerning Pacific Bell's motive for filing the letter can be resolved by reference to the letter itself. As I explained therein, the Commission's rules require anyone with information concerning potentially improper ex parte contacts to report them.<sup>6</sup> Had Pacific Bell failed to bring those contacts to the Commission's attention, Pacific Bell itself would have violated the Commission's rules. In addition, failure to raise the issue quite possibly would have precluded Pacific Bell from raising them on review. See Virgin Islands Tel. Co. v. FCC, 989 F.2d 1231, 1237 (D.C. Cir. 1993) ("it is fundamental that issues must be raised before the Commission as a prerequisite to [judicial] review"). See also 47 U.S.C. § 405. I therefore find APC's assertion that Pacific Bell included the phrase "in anticipation of judicial review" "to assist Pacific Bell in attracting press coverage," APC Letter at 2 n.3, simply baffling. That phrase means just what it says: Pacific Bell is contemplating seeking review, and in anticipation thereof, seeks to preserve any issue it might raise.

On the merits, APC's denials are surprisingly weak. To begin with, APC argues that it is under no obligation to account for the fact that it had "several" (more precisely, thirty) ex parte contacts in the two months leading up to the award. APC Letter at 3 n.6. APC contends that "[t]he issue of how many meetings occurred . . . is simply irrelevant." Ibid. But it remains unclear what legitimate reason APC might have for 30 ex parte contacts during this critical two-month period. The sheer number and intensity of the contacts itself creates an appearance of impropriety on the part of APC, even if every such contact were

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<sup>4</sup>Although APC neglects to give a citation for the language it quotes, that language comes from an article in the Sacramento Bee, Jan. 31, 1994, at C1.

<sup>5</sup>This was Pacific Bell's position in its comments before the Commission as well.

<sup>6</sup>See Letter from Michael K. Kellogg to Andrew S. Fishel 1 (January 26, 1994) (citing 47 C.F.R. § 1.1214).

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technically proper. As Lenin once remarked on the subject of tanks, sometimes quantity has a quality all its own.

Beyond this, as my initial letter and APC's response make clear, not all of APC's reports of its contacts were proper under the Commission's rules.

First, my letter (at 4) stated that, on October 25, APC filed a letter indicating only that APC had had three ex parte meetings to discuss "issues relating to the above-referenced docket [i.e., ET Docket No. 93-266]." <sup>7</sup> I pointed out that, at the time of the contacts so described, no filings in No. 93-266 had been made, "so the discussions could not have been 'reflected' in APC's previous filings within the meaning of Section 1.1206(a)(2)." APC responds that, "by the time it held its first discussion on" Docket No. 93-266, in fact "it had filed a position paper that described all [APC's] arguments." APC Letter at 5.

APC, however, concedes that its position paper was filed not in ET Docket No. 93-266, the proceeding about which the ex parte letter was filed, but in Gen. Docket No. 90-314. APC Letter at 5 ("That position paper was filed on September 27, 1993 -- before ET Docket 93-266 had even been opened"). The Commission's rules explicitly require disclosure if a party makes ex parte presentations in a proceeding and its arguments or data are not already reflected in the party's "previous" submissions "in that proceeding." 47 C.F.R. § 1.1206(a)(2) (emphasis added). Indeed, underscoring that requirement, the rules indicate that the memorandum "must clearly indicate on its face the docket number of the particular proceeding." Ibid. Because APC's contacts explicitly concerned Docket No. 93-266 (as the caption of its letter indicates), and because its positions could not possibly have been reflected in APC's previous written filings in that proceeding (there being none), it is clear that APC violated the Commission's rules. If in fact APC discussed its recent filing in General Docket No. 90-314, the proper course would have been to include those filings or at least refer to them in its letter.

Second, I pointed out in my letter that APC, by its letter of November 2, 1993, acknowledged making a presentation concerning

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<sup>7</sup>These contacts were memorialized in a Letter from Kurt A. Wimmer to William F. Caton (Oct 25, 1993).

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"the pioneer preference portion of Docket 90-314."<sup>8</sup> APC does not deny the concession or that "the pioneer preference portion of Docket 90-314" is restricted. Instead, APC responds that I am engaging in selective quotation. The full text of the letter, APC asserts, "indicates, quite clearly, that APC discussed with the General Counsel's office its then-just-filed [Request for Separate and Expedited Treatment of 'Existing Pioneer Preference' Issues in ET Docket 93-266] and the pleadings on file, which concerned unrestricted rule making issues in the referenced dockets [i.e., 93-266 and 90-314]." APC Letter at 8. But, first, APC's Request was itself not limited to the rulemaking issues in 93-266. In that document (at 8-9), APC stressed the public benefits of its obtaining its pioneer's preference and introducing its particular service as soon as possible. Any ex parte presentation to the Commission concerning those issues would be improper.<sup>9</sup> Second, APC itself acknowledged in its November 2, 1993 letter reporting the ex parte contact that it addressed the size and scope of the award that it would receive. Such a presentation falls within the restricted portion of General Docket No. 90-314 and was therefore improper.<sup>10</sup>

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<sup>8</sup>Letter at 1-2 (quoting Letter from Kurt A. Wimmer to William F. Caton (Nov. 2, 1993)).

<sup>9</sup>With respect to the nature of ET Docket No. 93-266, APC and I appear to be in substantial agreement. Although APC accuses me of creating a straw-man argument concerning the ex parte rules applicable to that proceeding, the straw man is entirely APC's. At no point do I suggest that ex parte contacts in 93-266 are entirely prohibited. Quite the opposite. I argued only that, to the extent 93-266 overlaps with the restricted portion of Docket No. 90-314, it must be considered a restricted proceeding as well. See Letter at n.5 ("the Notice makes ET Docket No. 93-266 a restricted proceeding with respect to individual pioneer preferences requests"). And that is precisely the interpretation that APC adopts. See APC Letter at 4 (contacts permitted in No. 93-266 "so long as the merits of the restricted proceeding are not discussed").

<sup>10</sup>I noted in my letter that at least part of this discussion apparently occurred in response to a question raised by the office of the General Counsel. APC, in its response, does not suggest that its presentation on the issue was limited to answering that question. In any event, under 47 C.F.R. § 1.1204(b)(7) (note), ex parte statements regarding restricted proceedings, if given in reply to questions by Commission personnel, must be summarized and

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Third, I pointed out in my letter (at 2) that APC's letter of September 29, 1993, while indicating that an ex parte contact concerning Docket No. 90-314 occurred, asserts that APC did not raise the "rulemaking issues" or "who should receive a pioneer's preference."<sup>11</sup> As I explained, those two exclusions cover everything at issue in 90-314; consequently, it is unclear what issues APC did raise. APC responds that its letter "unambiguously reports that APC discussed" the effect of the Commission's new auction authority on the preference program. APC Letter at 7 (emphasis added). Even a quick glance at the September 29, 1993 letter reveals that assertion to be false. Excluding the disclaimers concerning what was not discussed, the letter states only that "[t]he substance of the matters discussed is reflected in APC's written submissions on file with the Commission." No matter how the language of APC's September 29 letter is teased or twisted, one cannot pull from it the assertion that discussion centered on "whether competitive bidding undermines the preference program and the appropriate scope of preference awards," much less an "unambiguou[s]" assertion to that effect.

In fact, the rest of the September 29, 1993 letter demonstrates it cannot be so read. The propriety of continuing the pioneer's preference program despite Congress' decision to authorize auctions was shortly thereafter separated by the Commission into a separate rulemaking, as ET Docket No. 93-266. To the extent that this issue was present in 90-314 (prior to the commencement of 93-266) it was a rulemaking issue. Yet, according to the letter, rulemaking questions in 90-314 were not discussed (and 93-266 did not yet exist).

In sum, despite the length of APC's submission and the vigor of its rhetoric, APC has offered very little response to the substance of my letter. Given that APC's letter effectively concedes at least two violations and inadequately responds to questionable circumstances surrounding its remaining contacts, its aggressive tone seems out of place -- especially given that APC's attorneys and officers were found once before to be in violation of the Commission's ex parte rules. See 3 FCC Rcd 6141 (1988)

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the summary must be "served upon the other parties to the proceeding." APC does not contend that it served the parties as required by the rule, even though I pointed out that failure in my letter (at 2 n.2). Nor is it clear that APC's summary is adequate.

<sup>11</sup>Letter from Jonathan D. Blake to William F. Caton (Sept. 29, 1993).

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(discussing violations committed by APC attorney Jonathan D. Blake and Wayne D. Schelle, Chairman of APC).

Omnipoint and Cox's responses, although more restrained than APC's, similarly fail to respond to my concerns.<sup>12</sup> In my letter, I noted that several of Omnipoint's letters memorializing ex parte contacts might be considered incomplete. Specifically, all of Omnipoint's eleven ex parte letters filed in ET Docket No. 93-266 indicated only that Omnipoint had presented its "position with respect to the Commission's proposals." With respect to the first four of those letters, the arguments and data presented could not have been reflected in previous written filings because, at that time, Omnipoint had not made any. See Letter at 4.

Cox's letters, I noted, suffer from an identical defect. In the letters memorializing each of its four ex parte contacts in ET Docket No. 93-266, Cox asserts only that it had raised "outstanding issues in the Commission's Pioneer Preference Notice Proceeding." Once again the data or arguments presented could not have been reflected in the party's previous filings in that proceeding, as (once again) none had been filed.

Omnipoint and Cox respond only by pointing out (1) that ET Docket No. 93-266 and Gen. Docket No. 90-314 had a close nexus and (2) that they, at some point or another, filed many pages of comments in each. Cox Letter at 3-5; Omnipoint Letter at 2. Neither of these assertions is responsive. As explained above, the Commission's rules are clear. When a party makes an ex parte presentation in one proceeding, it must file a summary of any arguments or data not already reflected in the party's "previous" submissions "in that proceeding." 47 C.F.R. § 1.1206(a)(2) (emphasis added). That Omnipoint's or Cox's comments may have been reflected in previously filed comments in another proceeding, or that their after-filed comments in ET Docket No. 93-266 may have reflected the contents of the earlier ex parte contacts, is simply

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<sup>12</sup>One notable exception is Omnipoint's indication that its letter of September 29, 1993, in ET Docket No. 90-314, was served on all the parties to that proceeding. The letter does not so indicate on its face. To the contrary, the letter's extensive list of ccs shows only that it was widely distributed within the Commission. Moreover, the copy Pacific Bell was able to obtain did not contain any such proof of service. But the fact remains that, since Omnipoint did serve the parties as required by the Commission's rules, there is no reason for any investigation of that particular issue.

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irrelevant. Pacific Bell and others had a right to know what Cox and Omnipoint were telling the Commission on the same day that any presentation was made. 47 C.F.R. § 1.1206(a)(2) (memorandum must be filed on the day of the contact). Cox's and Omnipoint's post-hoc assertions concerning what was discussed, like APC's, are simply inadequate.

These may seem, to some, like mere technical violations of the Commission's rules. They are not. Because of the "close nexus" (Omnipoint Letter at 2) between ET Docket No. 93-266 and General Docket No. 90-314, a restricted proceeding, strict compliance with the Commission's rules is critical.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael K. Kellogg". The signature is fluid and cursive, with a prominent "K" and a stylized "g" at the end.

Michael K. Kellogg

cc: Brian F. Fontes  
Randall Coleman  
Byron F. Marchant  
Karen Brinkmann  
Robert Pepper  
Thomas Stanley  
William Kennard  
All Parties in ET Dkt. No. 93-266  
and Gen. Dkt. No. 90-314



Certificate of Service

I, Michael K. Kellogg, certify that on this 23rd day of February 1994, I caused copies of the foregoing Letter to Andrew S. Fischel to be served by first class mail, postage prepaid, on the parties on the attached service list.

  
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